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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 03 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

This petition, filed on February 28, 2008, seeks to classify the petitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel argues that the petitioner's "contributions to the field are substantially greater than those of others similarly employed" and that the director erred by ignoring the documentation submitted by the petitioner. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.--
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner received her Ph.D. in Microbiology from Arizona State University (ASU) in August 2007. The director found that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The

Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

We concur with the director's finding that the petitioner's work at ASU was in an area of intrinsic merit, biomedical science, and that the proposed benefits of her work at the university, research advancements in virology pertaining to the coronavirus, would be national in scope. It

remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Along with her published and presented work, educational qualifications, and other documentation pertaining to her accomplishments, the petitioner submitted several letters of support discussing her Ph.D. research at ASU under the supervision of [redacted], Associate Professor, Center for Infectious Diseases and Vaccinology (CIDV), Biodesign Institute, ASU.

[redacted] states:

> [The petitioner] has been doing research in [redacted]'s Lab in CIDV for the past 5 years.... During her graduate study, [the petitioner] conducted very challenging research on a group of infectious viruses. She focused on viral-infectious disease study, specialized in coronavirus. During the year 2002, the outbreak of the life-threatening disease Sever Acute Respiratory Syndrome (SARS) caused around a thousand deaths worldwide and led to a huge economic loss. Since then, a new coronavirus, SARS coronavirus, has been identified as the origin. Through study of this virus' life cycle, [the petitioner] made significant contribution to the understanding of this novel virus, and potential new strategies for its control. One of her achievements is the identification of a key motif of coronavirus that is responsible for the virus' assembly. The motif is defined by the position of four hydrophilic amino acids in the transmembrane domain of a small protein whose organization is critical in order for the whole virus particle to assemble. Due to [the petitioner's] unique perspective and insightful observation, she disclosed the importance of this motif through insightful experiments. This breakthrough not only helps understanding the new coronavirus, but also hugely contributes as a therapeutic

target in small molecue [sic] design for drug development. The other big contribution of [the petitioner's] research is beyond virus itself. She revealed a nontraditional mechanism carried by coronavirus to interact with host innate immune response. During the SARS outbreak, while most scientists were trying to fight the virus with interferon, which was a traditional theoretical treatment, [the petitioner] proposed that the virus was resistant to interferon. By her hard work, she not only provided strong evidence to support her hypothesis, but also revealed the unique mechanism by which coronavirus takes to interrupt the interferon system, more importantly, she discovered the viral protein that is the interferon antagonist. . . . As an expert in the field of infectious disease, I can anticipate anti-coronavirus drug and vaccine development by applying [the petitioner's] discoveries, in the event a reoccurrence of SARS and emergence of new viruses.

[redacted] opines that "in the event a reoccurrence of SARS and emergence of new viruses" he "can anticipate anti-coronavirus drug and vaccine development by applying [the petitioner's] discoveries." A petitioner, however, cannot file a petition under this classification based solely on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). While the petitioner's research for ASU is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted], states:

[The petitioner] worked in [redacted] lab in our department, and I have known her since she joined our center in 2005. In the beginning, [the petitioner's] research was focused on coronavirus budding and assembly. She used the novel full length infectious system to construct mutant viruses, and discovered the important role of the envelope protein of coronavirus in virus budding and assembly. Furthermore, she also identified this envelope protein functioning as a viroporin, providing new insight of this emerging area as novel strategy for virus therapy. More interestingly, by introducing mutation at different position of this protein, four importance [sic] amino acids and their position have been identified as the key motif of the protein activity. Thus, it provides an important target for small molecule design for drug development. Since the outbreak of SARS coronavirus, [the petitioner] has been conducting an exciting investigation on invasion of coronavirus in host innate immune response. Her finding of interferon resistance characteristics of coronavirus was one of the leading reports in the coronavirus field. In addition to that, she is the first researcher who identified the virus interferon antagonist and the involving mechanism. Thus, [the petitioner's] research has opened a new era in the treatment and vaccine development of SARS coronavirus.

> Based upon what I have seen of her work, I believe [the petitioner] to be an extraordinary research scientist, who has already made some important contributions to science, and who will without doubt accomplish more. I am sure that [the petitioner's] recent findings about coronavirus assembly and identification of the coronavirus interferon antagonist in its interaction with the innate immune system will greatly highlight the research work in virology field around the world. The results of her work have been presented at several important national and international conferences, many of which have been selected as oral presentation, suggesting the significance of her work. The detailed results have been published in the prestigious academic journals *Journal of Virology* and in the book chapter.

While the petitioner has published and presented the results of her graduate research at ASU, the Department of Labor's Occupational Outlook Handbook (OOH), 2010-11 Edition, (accessed at www.bls.gov/oco on February 18, 2011 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. *See* www.bls.gov/oco/ocos066.htm. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. Moreover, the doctoral programs training students for faculty positions require a dissertation, or written report on original research. *Id.* Further, the OOH states specifically with respect to the biological sciences that a "solid record of published research is essential in obtaining a permanent position performing basic research." *See* www.bls.gov/oco/ocos047.htm. This information reveals that original published research, whether arising from research at a university or private employer, does not set the set the petitioner apart from others in her field.

[redacted]
Center, states:

> I met [the petitioner] a couple of times at conferences such as the annual American Society of Virology meeting and I am convinced that she is a truly outstanding young scientist who has made substantial contribution in the field. In her paper called "Mouse Hepatitis Coronavirus A59 Nucleocapsid Protein is a Type I Interferon Antagonist" which appeared in the *Journal of Virology*, [the petitioner], as a lead author, discovered that a viral protein may allow the virus to evade the immune system. This ground breaking finding has received strong international recognition. Many scientists at other independent research groups have cited her work.

The petitioner submitted copies of 30 research articles citing to her work. A review of the submitted documents indicates than none of the petitioner's individual articles had been independently cited to more than a dozen times as of the petition's February 28, 2008 filing date. Moreover, almost half of the submitted articles were published subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider articles published after February 2008 in this proceeding. Further, at least two of the submitted citations were self-

citations by the petitioner's coauthor [redacted]. While a normal and expected process, the self-citations cannot demonstrate the petitioner's influence beyond [redacted] laboratory. On appeal, the petitioner submits a self-serving list of 42 purported citations that allegedly derives from Google Scholar. Twelve articles appearing on the petitioner's citation list are not documented in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Counsel provides no explanation for why the petitioner did not submit the actual printout from Google Scholar. Nevertheless, even if we accepted the self-serving list of undocumented citations, no single article by the petitioner has garnered more than a dozen independent citations as of the petition's February 28, 2008 filing date. Ultimately, the citation record submitted by the petitioner is not indicative of a notable influence in the field at the time of filing.

[redacted] University of Leubeck, Germany, states that he met the petitioner at scientific conferences in which they participated. [redacted] further states:

> [The petitioner's] work focused on coronavirus budding and assembly. She found the important role of the envelope protein of coronaviruses in budding. She also identified this envelope protein functioning as a viroporin. Her work provided new insight in this emerging area as a novel strategy for antiviral therapy. Since the outbreak of the SARS coronavirus, [the petitioner] has been investigating the intervention of the coronavirus with host innate immune response. She was the first scientist to identify a viral protein that may allow the virus to evade the immune systems. [The petitioner's] breakthrough has opened up a new approach into which others have followed. Many scientists have cited her work. Her articles have also become the subject of many review articles. She has become a sought-after expert in the treatment and vaccine development of SARS coronavirus.

As previously discussed, the citation evidence submitted by the petitioner indicates that no single article by her had garnered more than a dozen independent citations as of the petition's filing date. The articles citing to the petitioner's work after February 28, 2008 do not constitute evidence that her virology research was already influential as of that date. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. In this matter, that means that the petitioner must demonstrate her track record of success with some degree of influence in her specialty as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; *see also Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that her research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory

requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Accordingly, while citations published after the date of filing may serve as evidence of the continued relevance of an alien's work that had already been well cited as of the filing date, they cannot be considered evidence that the alien was already influential as of that date. To hold otherwise would have the untenable result of an alien securing a priority date based on the speculation that her work might prove influential while the petition is pending. As such, the AAO will not consider cites to the petitioner's work from March 2008 and later in this proceeding.

On appeal, counsel argues that the director ignored "substantial media reports of [the petitioner's] reach [sic] breakthrough." The petitioner submitted a May 2007 press release issued by ASU and posted at [redacted] and the ASU Biodesign Institute's website. This press release was prepared by [redacted] and then provided to the preceding websites. A press release is a written communication directed at the news media for the purpose of announcing information claimed as having news value. The preceding ASU press release, which is not the result of independent media reportage and which was sent to media outlets to encourage them to develop articles on a subject, is not indicative of a notable influence in the field. Nevertheless, the preceding two-page article only includes two sentences mentioning the petitioner and instead focuses on her supervisor [redacted].

Counsel further argues that the director disregarded the citation evidence and letters of support submitted by the petitioner. In this case, at the time of filing, there was not already an established pattern of frequent citation of the petitioner's work. Thus, even if the petitioner had documented a significant later pattern of citation, which we do not concede here, this would not establish that she was eligible for a national interest waiver at the time of filing. We note that citations are not the only means by which to show the petitioner's impact on her field. Independent witness letters can play a significant role in this respect. Here, however, the petitioner has submitted only a few such letters, which collectively fail to establish the depth or extent of her influence on the field as whole. Simply listing the petitioner's novel findings cannot suffice in this regard, because all graduate students and postdoctoral researchers are arguably expected to produce original work.

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts,

letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of virology researcher who has influenced the field as a whole.

While petitioner has contributed to research projects at ASU, she has not established that her past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. We note that the petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

Finally, we note that on the Form I-140, Immigrant Petition for Alien Worker, the petitioner failed to provide any information in Part 6, "Basic information about the proposed employment." Part 15 of the petitioner's Form ETA-750B, Statement of Qualifications of Alien, identifies the petitioner's employer as [redacted], a "Life Science merchant banking" business where she has worked since July 2007.[1] The description of duties at Part 15 states: "Intern as a research analyst for the life science industry, analyzing biopharmaceutical industry, scientific diligence spanning all major therapeutic areas, drug market competitive analysis." As previously discussed, the petitioner's past record must justify projections of future benefit to the national interest. *NYSDOT*, 22 I&N Dec. at 219. In the present matter, the petitioner has not established that she seeks to continuing working in the U.S. as a virology researcher specializing in the coronavirus. USCIS can infer future national impact from past impact in one's field, but only if the alien continues working in the same area of research. As the petitioner intends to intern as a biopharmaceutical industry research analyst for [redacted] it is not clear that her past research on the coronavirus is particularly indicative of her ability to benefit the national interest through her analytical work for a life sciences merchant bank. Moreover, the petitioner's research in the area that she intends to pursue with [redacted] is not documented to have been notably influential. Although the petitioner has worked for [redacted] from July 2007 to the petition's February 28, 2008 filing date, there is no evidence of her specific research accomplishments for the company during that period.

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[1] The company's website states: "[redacted] is a life sciences merchant bank focused exclusively on companies involved in biotechnology, pharmaceuticals, diagnostics, devices, human healthcare and related medical technologies, nutraceuticals and wellness, agricultural biotechnology, and industrial biotechnology (biomaterials/bioprocesses) with over $950 million under management. [redacted] technical and venture investing competence spans the entire spectrum of life sciences. The expertise of the firm's investment team, strategic partners and Advisory Boards is unparalleled in depth and breadth. In addition, [redacted] is a leader in life science strategic partnering, an invaluable practice to build value in portfolio companies and to accelerate their growth and development." *See* http://www.burrillandco.com/about_burrill.html, accessed on February 18, 2011, copy incorporated into the record of proceeding

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.